Cardwell v. Perthen, [2007] B.C.J. No. 1206

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

Prowse, Levine and Kirkpatrick JJ.A.

Heard: March 29, 2007.

Judgment: June 6, 2007.

Vancouver Registry No. CA033932

[2007] B.C.J. No. 1206 | 2007 BCCA 313 | 243 B.C.A.C. 135 | 68 B.C.L.R. (4th) 117 | 48 C.C.L.T. (3d) 137 | 57 R.P.R. (4th) 37 | 158 A.C.W.S. (3d) 491 | 2007 CarswellBC 1269

Between Eric Cardwell and Diane Susan Cardwell, Appellants (Plaintiffs), and Juergen E. Perthen and Helga G. Perthen, Respondents (Defendants)

(60 paras.)

Case Summary

Real property law — Sale of land — Quality defects — Latent — Patent — Appeal by purchaser of home from assessment of their damage claim against vendor for defects at $35,442 dismissed — Purchasers claimed $710,000, representing loss on resale of home six months after purchase — Purchasers did not conduct home inspection — Relied on engineering consultants' report and cost estimate for repairs in coming to decision to sell home for significant loss — Judge did not err in articulating and applying legal test for distinguishing between latent and patent defects — Judge did not err in concluding majority of problems with home were discoverable by purchasers if they had made reasonable investigation prior to purchase — Judge did not impose obligation on purchasers to hire professional home inspectors — Purchasers' attempt to mitigate damages by selling home at loss based on their experts' reports not relevant, where vendor not found liable for loss.

Appeal by the Cardwells from the court's assessment of their damages following judgment in their favour in their claim against the vendor of a home the Cardwells had purchased. The Cardwells claimed a loss of $710,000 on the sale of the home, but were awarded only $35,442 for latent defects the vendor, Perthen, failed to disclose. The Cardwells agreed to purchase the residence in May 2000 for $1,350,000. This was their second offer, made for $300,000 less than the asking price, without conditions and for all cash. The contract of sale was not made subject to the Cardwells completing a home inspection. After closing but before they moved in, the Cardwells discovered some problems and hired consulting engineers to make a report. The engineers recommended the Cardwells to either demolish or sell the home. Cost estimators reviewed the report and determined it would cost $1,000,000 to repair the deficiencies. Six months after closing, the Cardwells became aware of structural deficiencies, mould growth, and leaks throughout the home. They sold the home as is for a loss of $710,000. The purchaser, Bebek, spent $270,000 to cosmetically renovate the home for resale, and estimated time spent by himself and his brother in performing the renovations at about $270,000. Bebek sold the home for $1,265,000 in

August 2003. The Cardwells sued Perthen for negligence including negligent misrepresentation and negligent construction, fraud, and breach of contract. The judge reviewed the Cardwells' cost estimate for the repairs but gave it little weight, as it gave a deeply misleading impression of the true state of the property. She found it fraught with exaggerations and conclusions that lacked factual foundation. She noted the Cardwells bore the onus of satisfying themselves as to the quality of the home they had purchased. The judge distinguished patent defects, discoverable upon inspecting property, from latent defects, and noted there was a high onus on the Cardwells as purchasers to discover patent defects. She found only a few of the defects in the home to be latent, the remainder being discoverable by the Cardwells, had they conducted a proper inspection. She dismissed the Cardwells' claims for implied warranty of fitness, negligent misrepresentation, negligent construction and fraud.

HELD: Appeal dismissed.

The judge did not err in articulating and applying the legal test for distinguishing patent and latent defects. She did not impose a legal obligation on the Cardwells to hire a professional home inspector. She merely noted there might be circumstances where purchasers needed to employ professionals to understand what they observed to be patent defects. The judge also did not err in drawing conclusions about which defects were patent and which were latent, where the deficiencies she characterized as patent were visible to Cardwell without any invasive investigation. The issue of the Cardwells' mitigation of damages was not relevant, as Perthen was not found liable for the majority of the defects found in the home.

Counsel

J.A. Hand, and W. Sun: Counsel for the Appellants.

P. Sandhu: Counsel for the Respondents.

The judgment of the Court was delivered by

LEVINE J.A.

Introduction

1 This appeal concerns the liability of a vendor of a residential property for defects and deficiencies discovered by the purchasers after completing the purchase without a professional inspection. The appellants, the purchasers, claimed a loss of $710,000 suffered on the sale of the home. The trial judge found the respondent, the vendor, liable for damages of $35,442 for dangerous latent defects which he had failed to disclose. The appellants claim the trial judge erred in articulating and applying the legal test distinguishing patent and latent defects; failed to consider whether the mitigation efforts of the purchasers were reasonable; and failed to consider the appellants' claim of negligent construction. They ask this Court to reassess their damages.

2 The trial judge's reasons for judgment are reported at *(2006), 41 R.P.R. (4th) 118* and may be found at *2006 BCSC 333*.

3 For the reasons that follow, I would dismiss the appeal. The trial judge did not err in articulating and applying the legal test for distinguishing patent and latent defects. Whether or not the mitigation efforts of the appellants were reasonable at the time they suffered their loss, the vendor cannot be held liable for their loss. For the reasons given by the trial judge, it is not necessary to decide the appellants' claim for negligent construction. There is no basis for this Court to interfere with the trial judge's assessment of the damages.

Background

4 In May 2000, the appellants agreed to purchase the residence located in West Vancouver, B.C. for $1,350,000. The appellants viewed the home twice with their real estate agent. Their second offer, for $300,000 below the asking price, without conditions and for all cash, was accepted by the respondent. The contract of purchase and sale was not made subject to the appellants completing an inspection of the home, and the appellants did not retain a qualified inspector to inspect the home before closing.

5 Shortly after the closing, the appellants became aware of structural deficiencies, mould growth, and leaks throughout the home. Six months after the purchase, the appellants sold the home in an "as is" condition for a loss of $710,000.

The Renovations

6 The respondent purchased the residence in 1986. At that time, it was a 2,000 square foot, single-storey bungalow. In the following years, the respondent, who had considerable experience in matters of general construction and property management, extensively renovated the property. Among other modifications, he built a series of retaining walls; relocated the kitchen, added a bathroom and bar to the home; moved an interior wall; added a beam to the dining room; and enclosed an outdoor patio to enlarge the living room area. The respondent carried out most of the renovations himself, or had them done at his direction. The respondent and his wife lived in the residence throughout the renovations.

7 The respondent originally commenced the work without obtaining the necessary permits. The neighbours became concerned about the work, especially the construction of the retaining walls. Following complaints from one or more of the neighbours, the District of West Vancouver sent an inspector to the property. Although the District expressed some initial concerns about the deficiencies in the building plan, it granted the required permits to continue with the renovations. From that point on, periodic inspections were conducted by the District. Numerous deficiencies were identified over time, and the respondent remedied those deficiencies or allayed the District's concerns by hiring expert third parties to prepare inspection reports to confirm the integrity of the designs and renovations.

8 In the end, the property was transformed from a modest bungalow into "Hacienda Del Norte": a spacious, Santa Fe style residence with a partial upper level, extensive pitched and flat-roof areas, a two-storey ornamental bell tower, a covered portico supported by columns and a second garage.

Discovery of Defects and Deficiencies

9 Before moving in, the appellants decided to undertake some minor cosmetic renovations to

the home. They intended to replace the carpet in the living room and home office with tile. When they lifted the existing floor, they found that the sub-floor had been constructed over old carpeting, the wiring did not go through the floor joists but over it, and a vapour barrier was installed on top of the joists - all of which caused moisture to collect under the floor, resulting in rot and mould. Flaws were also discovered in the master bedroom: below the sub-floors, the wood timbers were soggy and black fuzzy mould was present on some of the joists. As the sub-floors were removed throughout the house, the appellants began to realize the extent of their problem. Underneath the sub-floor in the family room, there was no concrete slab, only soil. Black water was dripping out of the joists and there appeared to be mould.

10 The appellants sought a report on deficiencies from Gordon Spratt & Associates, consulting engineers. The two principal contacts at Gordon Spratt & Associates were Mr. Trundle and Mr. van Blankenstein. The appellants received a report on October 10, 2000 (the "Spratt Report"), which listed numerous deficiencies to the floors, walls, roof structures, outbuildings and retaining walls. The Spratt Report recommended that the appellants either demolish the house and build a new one, or sell it.

11 The appellants retained cost estimators, Heylar & Associates, to review the Spratt Report and determine the cost to repair the deficiencies. The estimate was in excess of $1,000,000.

12 The appellants believed their only two options were to either rebuild the home at considerable expense, or sell it and cut their losses. Based on the Spratt Report and the cost estimate, and motivated by the danger created by the toxic mould, the appellants chose to sell the home.

Re-sale of the Home

13 The property sold quickly to an associate of Mr. Bebek, a builder, for $700,000. The intention was that Mr. Bebek and his brother would cosmetically restore the house for resale.

14 Six months after they purchased the home, the appellants realized a loss of $710,000 (including fees and other charges on the sale).

15 At trial, Mr. Bebek testified that he spent approximately $270,000 to cosmetically upgrade the property (including $50,000 to remodel the kitchen and a bathroom). This amount represented his out-of-pocket expenses, and did not include amounts for wages or management fees for him or his brother. He estimated that these fees would be about an additional 10-15% of the $270,000.

16 In August 2003, an associate of Mr. Bebek sold the property for $1,265,000 to the McLoughlins. Prior to the purchase, the McLoughlins commissioned an inspection, which revealed that some flashing had to be added and that other minor work was needed. None of this was significant. Shortly after the purchase, the roof began to leak. The McLoughlins spent approximately $100,000 upgrading the home. They did not break down how much of this was expended solely on repairing the leaky roof. The McLoughlins decided to sell the property for $1,350,000 after owning it for only nine months.

The Lawsuit

17 The appellants sued the respondent for negligence (including negligent misrepresentation

and negligent construction), fraud, and breach of contract. Before trial, they settled their claims against the respondent's real estate agent, the realty company for whom she worked, the District of West Vancouver, the engineering company retained by the respondent, and one of its engineers.

Trial Judge's Reasons for Judgment

18 The trial judge reviewed the background and evidence in detail. She discussed (at paras. 73-118) the "Details of the Principal Alleged Deficiencies", with reference to the Spratt Report, the trial evidence of Mr. van Blankenstein, and other experts who gave evidence for each of the parties.

19 The trial judge described the Spratt Report (at para. 73):

> In overview, the Spratt Report is a strongly worded condemnation of the construction quality of practically the entire residence and every out-building and the retaining walls. It describes work as being crude and unprofessional at times achieving an appalling workmanship standard. With a broad brush it paints a picture of a grievously flawed residence, with massive leaking or potential for significant water ingress, mold, structural defects and settlement concerns. In effect, it advocates demolition of much of the house. Also in evidence were videos capturing Mr. van Blankenstein's criticisms on site taken just before the Cardwells sold and one taken by Mr. Perthen during a weekend break of trial showing the current exterior condition. I will discuss below, under separate headings, the main areas of concern.

20 In reviewing the main areas of concern with the property. as described in the Spratt Report, the trial judge found that neither Mr. van Blankenstein nor the other experts supported the opinions that had been expressed in the Spratt Report. The trial judge noted that with reference to "Walls and Sub-Floor Deficiencies", Mr. van Blankenstein "became surprisingly equivocal on the moisture issue" (at para. 75); on "Roof Deficiencies", he "qualified this statement [about water penetrating the roof] very significantly on cross-examination where he agreed that rain water was in fact not penetrating when he wrote his report and that his report was merely speaking to the potential of that occurring" (at para. 85); on the "Foundations", "Mr. van Blankenstein's evidence was insufficient to show that the foundations were inadequate or failing or that there was systemic problems with the walls, roof or floors" (at para. 97). In the result, the trial judge placed little weight on the Spratt Report (at paras. 116-118):

> In carefully weighing the evidence, I have concluded that the Spratt Report conjures a deeply misleading impression of the true state of the property. I have already referred to a number of instances where Mr. van Blankenstein's criticisms were exaggerated or without factual foundation altogether. Those previously articulated examples do not amount to an exhaustive list. There were many instances in Mr. van Blankenstein's cross-examination where he attempted to resile from the recommendation in the Spratt Report that the house be torn down. In the end, he admitted that a wholesale demolition might not be required. Mr. van Blankenstein failed to distinguish between areas of the house that had simply gotten worn out (e.g. the flat roofs of the garage) from areas that are alleged to be constructed in a negligent manner. Allegations of shoddy workmanship are not put in perspective. While Mr. van Blankenstein agreed that the Spratt Report painted a very bleak picture of the situation for the Cardwells at the same time he agreed that the next step in the process would have been to conduct a more intrusive investigation. His

inspection did not involve any destructive testing except for a hole put through the lower brick wall of the family room and in the ceiling between the family and living rooms.

It would appear that the standards applied by Mr. van Blankenstein in respect of a substantial number of identified shortcomings were whether the work had been carried out to a high standard for a residence of such cost and whether it represented best practices. Indeed, at the close of the unedited version of the Spratt Report originally provided to the Cardwells, it states that Helyar & Associates' costings, which were based on the deficiencies highlighted by Mr. van Blankenstein, were for "remediation, to return 835 Younette Drive into a habitable residence to the high standard which Mr. and Mrs. Cardwell believed they purchased."

In all the circumstances, I consider it unsafe to rely on much of the contents of the Spratt Report and give it little weight.

21 Having reviewed the evidence of the alleged defects and deficiencies, the trial judge turned to the applicable law. She noted (at paras. 119-120) the continuing application of the doctrine of *caveat emptor* in the context of the purchase and sale of real estate, and the exceptions to the rule which bring into play the distinction between patent and latent defects (paras. 121-129). She also considered the law relating to implied warranty of fitness in used homes, negligent misrepresentation, and negligent construction.

22 Referring to ***Fraser-Reid v. Droumtsekas***, *[1980] 1 S.C.R. 720*, the trial judge noted (at para. 119) that the onus is on the purchaser of real property to satisfy him or herself as to the quality of property being sold. As the Supreme Court of Canada said (at 723): "... *caveat emptor* remains a force to be reckoned with by the credulous or indolent purchaser of housing property."

23 The trial judge found (at para. 121), citing ***McCluskie v. Reynolds*** *(1999), 65 B.C.L.R. (3d) 191* at para. 53 (S.C.), that there are generally four exceptions to the application of the rule of *caveat emptor*:

(1) where the vendor fraudulently misrepresents or conceals;

(2) where the vendor knows of a latent defect rendering the house unfit for habitation;

(3) where the vendor is reckless as to the truth or falsity of statements relating to the fitness of the house for habitation;

(4) where the vendor has breached his or her duty to disclose a latent defect that renders the premises dangerous.

24 Thus, *caveat emptor* will not apply where the vendor fails to disclose dangerous latent defects. As the trial judge noted (at para. 122): "The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine."

25 The trial judge set out the test for distinguishing patent and latent defects (at para. 122):

... Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. The authorities provide some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the distinction between latent and patent defects. In general, there is a fairly high onus on the purchaser

> to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nonetheless be patent if it would have been discoverable upon a reasonable inspection by a qualified person: *44601 B.C. Ltd. v. Ashcroft (Village)*, *[1998] B.C.J. No. 1964* (S.C.) [*Ashcroft*]; *Bernstein v. James Dobney & Associates*, *2003 BCSC 986* [*Bernstein*]. In some cases, it necessitates a purchaser retaining the appropriate experts to inspect the property (see for example *Eberts v. Aitchison (2000), 4 C.L.R. (3d) 248*, *2000 BCSC 1103*.

[Underlining added.]

26 The trial judge found (at para. 131) that the sub-floors of the family room, master bedroom and en-suite bathroom had latent defects negatively affecting the habitability of the home, and that the respondent knew of or was reckless in failing to disclose those defects. Further, the trial judge found (at para. 133) that the respondent knew of the leaks in the roof at a skylight area and between the living and family rooms. She determined (at para. 132) that the remaining deficiencies were patent defects that were discoverable upon a reasonable inspection and by making reasonable inquiries. In the end, the trial judge awarded the appellants total damages of $35,441.99.

27 The trial judge dismissed the claim for implied warranty of fitness, finding that it only applied to newly constructed homes (at para. 162). She also dismissed the claim for negligent misrepresentation on the ground that the appellants had not relied on the Disclosure Statement (at para. 147). The trial judge further dismissed the claim for negligent construction, determining that absent fraud, negligent misrepresentation, or active concealment, there is no basis for holding a negligent builder liable to a purchaser for patent construction defects (at para. 171).

Grounds of Appeal

28 The appellants listed six grounds of appeal in their factum. Essentially, they claim that the trial judge erred in not assessing their damages as the loss of $710,000 on re-sale of the home.

29 The appellants claim that the trial judge applied the wrong principles in assessing damages, with reference to the cost of repairs rather than the loss in value of the home, and erred in failing to consider the reasonableness of their mitigation efforts in relying on the Spratt Report in deciding to sell the home.

30 The appellants claim that the trial judge applied the wrong test for distinguishing patent and latent defects, by defining patent defects as those that "would have been discoverable upon a reasonable inspection by a qualified person."

31 The appellants claim further that the trial judge erred in not finding the respondent liable for negligent construction, by failing to consider whether the respondent owed the appellants a duty of care on the principles of ***Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.***, *[1995] 1 S.C.R. 85*, and holding that for a construction defect to constitute a real and substantial danger, the danger must be "imminent".

32 The appellants also claim that the trial judge erred in assessing the damages for patent defects, and seek a reassessment by this Court.

33 The appellants do not appeal the trial judge's rejections of their claims of implied warranty, fraud, and negligent misrepresentation.

Discussion

34 The first issue that must be considered is whether the trial judge erred in her articulation and application of the test for distinguishing patent and latent defects. This is the crux of the determination of whether, and to what extent, the respondent is liable to the appellants for the defects in the home. It is only to the extent that the appellants establish liability that issues of damages are relevant.

35 As will be seen, I am of the view that the trial judge did not err in her determination of the respondent's liability. That is, she applied the proper test in determining which defects and deficiencies the appellants complained of were undisclosed dangerous latent defects for which the respondent was liable, and awarded damages for those.

36 On that basis, the appellants' claims that the trial judge erred in not assessing damages as the loss suffered on the sale of the home cannot stand - it would be a wholly unreasonable assessment of their loss. (For a recent discussion of the principles relating to the assessment of damages for construction defects, see ***514953 B.C. Ltd. dba Gold Key Construction and Chiu v. Leung***, *2007 BCCA 114*.)

37 Nor is there any basis on which this Court can reassess the damages for the latent defects - the appellants have not shown that the trial judge made any error in law or principle in her assessment, or that the award is so inordinately low that it cannot stand: see ***Larocque v. Lutz*** *(1981), 29 B.C.L.R. 300*; *[1981] B.C.J. No. 728* at para. 5 (C.A.).

38 The appellants' claims regarding the trial judge's findings in relation to their claim for negligent construction similarly cannot succeed. The trial judge dismissed the claim (at paras. 171-172):

> Leaving aside the question of whether a duty of care has arisen in the case at hand, it is clear that the negligent construction defects about which the authorities are concerned are dangerous latent defects, not patent ones. In the absence of fraud or negligent misrepresentation or active concealment by a builder or similar reprehensible conduct, there is no basis in the jurisprudence, as it presently stands, to hold a negligent builder liable to a purchaser for patent construction defects.
>
> For the purpose of resolving the dispute between these parties, it is unnecessary for me to go beyond this general discussion and make a finding about whether a duty of care has arisen. This is because I have already found that Mr. Perthen knew about and/or was reckless as to, and failed to disclose, the existence of certain latent defects that rendered his property unfit for human habitation and, as concerns the mold, also posed a significant risk. He is liable to the Cardwells based on these recognized exceptions to the doctrine of *caveat emptor*. In this case, pursuing a claim in negligence would afford no greater remedy to the Cardwells. In particular, it would not entitle them to damages flowing from the alleged negligent construction of the retaining walls because I have concluded that there were more than sufficient visible symptoms to have put them on notice of potential problems and therefore amount to patent defects.

[Underlining added.]

39 Nothing the appellants said in their factum or submissions casts any doubt on the correctness of the trial judge's assessment of the law and its application on the facts of this case. I would not accede to these grounds of appeal.

40 That leaves the question of whether the appellants reasonably mitigated their loss by relying on the Spratt Report. I will say more about that later in these reasons.

Patent and Latent Defects

41 The appellants object to the trial judge's reference, in her articulation of the test for distinguishing patent and latent defects, to a "reasonable inspection by a qualified person". They say that this phrase "suggest[s] that the law imposes an absolute obligation on a purchaser of real property to obtain an inspection by a qualified home inspector". That is clearly not the law.

42 The appellants say further that in applying this test, the trial judge continuously referred to the evidence of the various experts with respect to whether the alleged defects were "discoverable", or "visible to the eye" on a reasonable inspection and by making reasonable inquiries. They point out that the test of whether a defect is patent or latent does not require that a "learned professional" conduct the inspection.

43 On close analysis of the trial judge's articulation and application of the test for distinguishing patent and latent defects, she made neither of the errors claimed by the appellants.

44 The trial judge articulated the test (at para. 122, quoted again for convenience):

> The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine. Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property. The authorities provide some guidance about the extent of the purchaser's obligation to inspect and make inquiries. The extent of that obligation is, in some respects, the demarcation of the distinction between latent and patent defects. In general, there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that a defect which might not be observable on a casual inspection may nonetheless be patent if it would have been discoverable upon a reasonable inspection by a qualified person: *44601 B.C. Ltd. v. Ashcroft (Village)*, *[1998] B.C.J. No. 1964* (S.C.) [*Ashcroft*]; *Bernstein v. James Dobney & Associates*, *2003 BCSC 986* [*Bernstein*]. In some cases, it necessitates a purchaser retaining the appropriate experts to inspect the property (see for example *Eberts v. Aitchison* *(2000), 4 C.L.R. (3d) 248*, *2000 BCSC 1103*.

45 The appellants take no issue with the trial judge's statement that: "Patent defects are those that can be discovered by conducting a reasonable inspection and making reasonable inquiries about the property." That is consistent with the articulation of the test in the cases cited by the trial judge, including by the Ontario Court of Appeal in ***Tony's Broadloom & Floor Covering Ltd. v. NMC Canada Inc.*** *(1996), 141 D.L.R. (4th) 394* at para. 19 (quoted by the trial judge at para. 123).

46 The trial judge goes on to discuss "the extent of the purchaser's obligation to inspect and make inquiries", noting that "[i]n general, there is a fairly high onus on the purchaser to inspect and discover patent defects." The appellants do not disagree with those statements.

47 The trial judge then describes a circumstance where a patent defect may not be observable on a casual inspection: "if it would have been discoverable on a reasonable inspection by a qualified person", it may be a patent defect. I take her to be saying that, while on a casual inspection the purchaser may not discover a patent defect, when the purchaser makes the reasonable inquiries required, they may lead to the discovery, by a qualified person, of a discoverable, thus patent, defect. She explains further: "In some cases, it [the onus on the purchaser] necessitates a purchaser retaining the appropriate experts to inspect the property."

48 The appellants' interpretation of the trial judge's articulation of the test for distinguishing patent and latent defects results from taking the phrase in which she refers to "a qualified person" out of context. In the context in which she uses that phrase, there can be no objection. The cases make it clear that the onus is on the purchaser to conduct a reasonable inspection and make reasonable inquiries. A purchaser may not be qualified to understand the implications of what he or she observes on personal inspection; a purchaser who has no knowledge of house construction may not recognize that he or she has observed evidence of defects or deficiencies. In that case, the purchaser's obligation is to make reasonable inquiries of someone who is capable of providing the necessary information and answers. A purchaser who does not see defects that are obvious, visible, and readily observable, or does not understand the implications of what he or she sees, cannot impose the responsibility - and liability - on the vendor to bring those things to his or her attention.

49 In my opinion, the trial judge said no more and no less.

50 Further, the trial judge's references to the opinions of the experts occurred in the context of her assessment of their evidence. In drawing her conclusions, however, about which of the alleged deficiencies were patent defects and which were not, she applied the proper test to her findings of fact relating to what the appellant, Mrs. Cardwell, would have seen on a reasonable inspection and by making reasonable inquiries (at para. 133):

> In my view, the remainder of the deficiencies complained of by the Cardwells could have been discoverable upon a reasonable inspection and making reasonable inquiries. As mentioned earlier, an exception to this is the loomex cables resting on top of the joists of the living rooms sub-floor. However, there was no evidence such wiring made the premises unsafe or uninhabitable. Many of the so-called defects more accurately amount to poor observations of [*sic*] workmanship falling below the high quality standard Mr. van Blankenstein expected of such an expensive residence. Mr. van Blankenstein repeatedly noted that the areas of work he was criticizing were visible: a point he demonstrated with force in his video. The Cardwells' geotechnical engineer, Mr. Lui, admitted that the cracks in the landscaping retaining walls would have put him on notice that there may be a reason for concern. One of the most compromised of the walls was Wall 5 which ran along side of the driveway and plainly observable to all who used that access to the property including Mrs. Cardwell. I reject the contention that bushes and overgrown vegetation obscured the view of the retaining walls to the extent of converting otherwise patently visible deficiencies into concealed, latent ones. The poor shape of the hot tub

> could have been easily discovered and, by Mr. van Blankenstein's own evidence, so too could the exterior brick wall of the family room and most of the roofs.

[Underlining added.]

51 The trial judge noted matters that Mrs. Cardwell observed during the months that the investigations were taking place that led to the Spratt Report (at para. 48):

> Mrs. Cardwell observed what she understood were deficiencies with the Spanish style pitched tile roof. She said she encountered leaking and swelling of walls in the main floor bathroom. Mushrooms appeared on the ceiling in the family room and damp patches on another part of the ceiling. Mold was present behind a ceramic pot on a small nook in the wall between the dining room and kitchen. There was also mold in the bell tower. Some electrical wires were bare and needed capping. The ceiling of the old garage was sodden and mold was present. The hot tub was not operational. The water in the kitchen sink came out black. Mrs. Cardwell was later told this was due to the lack of a back flow preventer valve.

52 It appears that most of these deficiencies were visible to Mrs. Caldwell without invasive investigation. Although the trial judge did not expressly draw that inference from this evidence when she concluded that most of the defects were plainly visible to Mrs. Cardwell on a reasonable inspection, it clearly supports her conclusion.

53 Thus, I would not accede to the appellants' argument that the trial judge articulated and applied the wrong legal test for distinguishing patent and latent defects.

Reasonable Mitigation

54 The appellants say that their decision to accept the recommendation in the Spratt Report that they sell the house in lieu of demolishing and rebuilding it was a reasonable decision at the time they made it, and should have been accepted by the trial judge as reasonable mitigation of their damages, even if it turned out later to be wrong: see ***Kamlee Construction Ltd. v. Town of Oakville*** *(1960), 26 D.L.R. (2d) 166* (S.C.C.), *[1960] S.C.J. No. 1* at paras. 25-32.

55 The appellants correctly state the law: the actions of a person attempting to mitigate damages are to be judged at the time the actions took place, and where the decision is based on expert evidence, the decision is still a reasonable one, even if the advice was later found to be inaccurate. The appellants could not have known that Mr. van Blankenstein would resile from his opinion on cross-examination at trial, and the trial judge would largely reject the Spratt Report.

56 As the respondent points out, however, it is only if the vendor is found to be liable that considerations of damages, including mitigation, come into play. The vendor's liability is limited, by the law of *caveat emptor* and its narrow exceptions, to damages for undisclosed dangerous latent defects. The vendor's liability cannot be extended to losses suffered from other causes, such as the negligent, or simply exaggerated, opinion of the purchaser's expert.

57 If anyone is legally liable for damages for the purchaser's loss, it can only be the expert, not

the vendor: see, for example, ***Khaira v. Nelson***, *2002 BCSC 1045*, where the home inspector admitted that he failed to notice a slope in the floor of the home. The vendor was not liable because the Court found the slope was a patent defect. The purchaser was awarded damages against the inspector.

58 I would not accede to this ground of appeal.

Conclusion

59 The trial judge did not err in articulating and applying the legal test for distinguishing patent and latent defects, or in failing to consider whether the appellants reasonably mitigated their losses by selling the home at a loss of $710,000. The appellants have not demonstrated any errors of law in the other grounds of appeal raised by them.

60 I would dismiss the appeal.

LEVINE J.A.
PROWSE J.A.:— I agree.
KIRKPATRICK J.A.:— I agree.
